STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF SALLY PACERNICK,[1] Plaintiff-Appellant, v FARMER JACK, a/k/a BORMAN'S, INC., Defendant-Appellee.	UNPUBLISHED April 1, 2003 No. 229538 Oakland Circuit Court LC No. 99-017985-NO

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

I. Nature of the Case

While shopping at Farmer Jack on May 21, 1999, plaintiff's decedent, Sally Pacernick (plaintiff), walked into a pallet stacked with bags of charcoal and injured her leg. According to unrebutted deposition testimony, (1) plaintiff was warned twice of the oncoming pallet and (2) plaintiff admitted that she "wasn't paying attention and [she] skidded into -- [her] leg skid into the pallet." Again, according to the only unrebutted eyewitness testimony, plaintiff "was looking at products at the end of the aisle, talking -- talking to another customer," when she walked into the pallet.

Plaintiff sued Farmer Jack for simple negligence and Farmer Jack answered and, after some discovery, asked the trial court to summarily dismiss plaintiff's case because Farmer Jack had no duty, as a matter of Michigan law, to warn plaintiff of an obvious danger such as a pallet loaded with product. The trial court rejected plaintiff's theory that this is a simple case of comparative negligence and, instead, ruled that plaintiff's tort case should be dismissed because Farmer Jack had no duty to warn plaintiff of an open and obvious danger.

On appeal, plaintiff argues alternative theories for reversal. First, plaintiff says that the trial court erred in applying the open and obvious danger doctrine because the nature of the risk is such that reasonable minds could differ on whether the risk was open and obvious and, therefore, this question should have been submitted to the jury.

[1] Sally Pacernick died of unrelated causes shortly after filing her complaint.

In the alternative, plaintiff contends that the open and obvious danger doctrine is simply inapplicable under these circumstances and the court should have analyzed and ruled on this case under a pure comparative negligence standard.

II. Analysis

Historically, a landowner had no duty to protect from harm those who came upon his land.[2] To ameliorate the harshness of this rule, as to those injured by dangerous conditions, courts increasingly imposed more duties of care upon landowners.[3]

However, in determining the question of the landowner's duty, courts have routinely held, as a matter of law, that landowners have no duty to warn about obviously dangerous conditions.[4]

Under circumstances where the danger is obvious but the potential for harm is very serious, courts, including our Supreme Court, have imposed a duty to ameliorate the openly dangerous condition.[5] Here, in light of the relatively moderate danger, this line of cases and reasoning does not apply and, therefore, we turn our attention to the basic rule and issue: under these circumstances, did Farmer Jack have a duty to warn plaintiff of the danger posed by the pallet filled with bags of charcoal?

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[2] "In the past, landowners were sovereign over their land, and they were immune from liability for accidents that occurred on their land." Note, *Premises Liability: The disappearance of the open and obvious doctrine - Smith v Wal-Mart Stores, Inc*, 64 Mo L Rev 1021 (1999).

[3] As our Supreme Court explained in *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000):

> Historically, Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee. *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987). Michigan has not abandoned these common-law classifications. *Reetz v Tipit, Inc*, 151 Mich App 150, 153; 390 NW2d 653 (1986). Each of these categories corresponds to a different standard of care that is owed to those injured on the owner's premises. Thus, a landowner's duty to a visitor depends on that visitor's status. *Wymer, supra* at 71, n 1.

[4] In *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992), our Supreme Court explained, as to hidden or latent defects, "[i]t is well-settled in Michigan that a premises owner must maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury." *Id*. at 90-91. However, "if the dangers are known or obvious to the invitee, no absolute duty to warn exists, and the invitee cannot recover on that theory." *Id*. at 92.

[5] See *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001).

Our Supreme Court's articulation of the open and obvious danger doctrine in *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992), is consistent with that of the Restatement of Torts:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. [*Id.* at 94, quoting 2 Restatement Torts, 2d §343A(1).]

The *Riddle* Court emphasized that the open and obvious danger rule does not run contrary to Michigan's adoption of comparative negligence:

> The adoption of comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees. Moreover, we find that the duty element and the comparative negligence standard are fundamentally exclusive -- doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action. [*Id*. at 95.[6]]

The Court further clarified that the trial court must decide the threshold *duty of care as a matter of law* and that the "open and obvious danger rule is a defensive doctrine that attacks the *duty* element that a plaintiff must establish in a prima facie negligence case." *Id*. at 95-96.

In *Novotney v Burger King Corp*, 198 Mich App 470; 499 NW2d 379 (1993), this Court set forth the test to determine whether the open and obvious danger rule applies to relieve a premises owner from its duty to warn or make the premises safe. The *Novotney* Court set forth the objective nature of the open and obvious inquiry as follows:

> The question is: Would an average user with ordinary intelligence have been able to discover the danger and risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger? With respect to an inclined handicap access ramp, we conclude that it is. [*Id*. at 475]

The Court emphasized that, whether the plaintiff actually saw the danger is irrelevant, and the focus is not on whether the condition could have been made safer or more obvious. *Id*. Rather, to survive a motion for summary disposition, the plaintiff must "come forth with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the . . . condition." *Id*. at 475. *Novotney*, therefore, indicates that the jury, not the judge, must decide the scope of a landowner's duty to warn based on the applicability of the open and obvious danger rule if sufficient evidence is produced to create a genuine issue of material fact.

Was the Pallet an Open and Obvious Danger?

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[6] In other words, "[a]lthough the adoption of comparative negligence may have limited a defendant's defenses, the defendant's initial duty has not been altered." *Riddle, supra* at 98.

Because reasonable minds could differ on this pivotal question, we reverse and remand to the trial court.

Here, plaintiff moved sideways while looking at products and talking to customers. Further, though the employee moving the pallet in the direction of the customer warned the plaintiff twice by saying "excuse me," there is no evidence that plaintiff heard the warning. Also, a careful review of the record fails to disclose if the pallet had stopped when plaintiff "skid" into it, or, whether plaintiff "skid" into a pallet.

Under all the circumstances, we conclude that reasonable minds could differ on the question of whether the pallet was an open and obvious danger. Accordingly, though this question is ordinarily a question of law for the trial judge to decide, here, we hold the jury should decide this dispositive question to determine if Farmer Jack owed any duty to warn plaintiff of the pallet. We hold that plaintiff has produced sufficient evidence to create a genuine issue of material fact as to whether a reasonably prudent and observant shopper should have been aware of the risk posed by the pallet.

We reverse and remand to the trial court to proceed consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael R. Smolenski